australasian risk management

A builder's duty: where does the buck stop?

If you build a commercial building and a subsequent owner discovers a structural problem, can you be sued for the costs of fixing the problem before it causes any physical damage to a person or property? Doug James, head of the construction and major projects group at Clayton Utz, examines the issue.

A recent decision by the High Court indicates that suing in negligence with regard to structural problems in buildings will be a difficult task, and that much turns on the ability of a subsequent owner to protect itself from the consequences of the builder's lack of reasonable care.

The sagging complex

The facts in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HA 16 (1 April 2004) are quite simple. CDG is a firm of consulting engineers that designed footings for a warehouse and office complex in Townsville. CDG told the complex owner that soil tests would be wise, but the owner told it to proceed without soil tests and to use structural footing sizes provided by the builder. After the complex was built the owner sold it to Woolcock Street Investments.

Importantly, the contract of sale to Woolcock did not include any warranty that the building was free from defect. Additionally, the original owner did not assign any rights it may have had against others in respect of any such defects, nor did Woolcock inspect the building or ask tenants if there were any structural defects.

Over a year later it became obvious that the complex was sagging, because the footings, foundations or both were settling. To fix the problem, Woolcock would need to knock down parts of the complex and rebuild them. It sued CDG, alleging CDG owed it a duty to take reasonable care in designing the footings for the building.

The type of loss it had suffered (the costs of knocking down parts of the complex and rebuilding them, and also lost rent moneys) is known as 'pure economic loss', as there was no physical damage to a person or property (the sagging of the building is presently not considered by Australian courts to be physical damage to property). Usually, courts are very reluctant to award damages for pure economic loss, but in *Bryan v Maloney* (1995) 182 CLR 609 the High Court said a builder of a residential house owed a subsequent owner of the house a duty to take reasonable care to avoid economic loss. But what about builders of commercial buildings? Do they owe a similar duty to subsequent purchasers?

If there was a duty to subsequent buyers, it would have major effects on the construction industry — builders would have a liability without end, building down to a price would become very risky, and costs could inflate to cover the risk.

Why there was no duty in this case

In rejecting Woolcock's claim, the High Court made two points.

- First, the principles upon which *Bryan v Maloney* was decided have evolved over the years — in particular, the plaintiff's vulnerability (that is, its inability to protect itself from the consequences of the defendant's lack of reasonable care) is now an important issue in finding liability for pure economic loss. In addition, the proximity of the relationship between the plaintiff and the defendant is no longer seen as the determining factor in this area.
- Secondly, before deciding what, if

any, duty was owed to Woolcock, the Court must ask what duty CDG owed to the original owner.

Even adopting the principles used in *Bryan v Maloney*, there would be no duty to Woolcock — it was not alleged that CDG owed the original owner of the land a duty to take reasonable care to avoid economic loss of the kind complained of. Nor did CDG assume responsibility outside of the contract; the owner did not entrust the design of the building to CDG under a simple, 'non-detailed' contract, and it took control of the construction by instructing CDG not to perform the soil tests. Using the new principles of vulnerability, there still would not be a duty, as Woolcock could have protected its interests by asking for a warranty or having the building inspected.

How can the construction industry protect itself?

Although this was not a determining factor in this case, the High Court has confirmed that the terms of the contract between the original owner and the builder will be a relevant consideration when determining what duty a builder owes to subsequent purchasers. At the least, the contract will define the task that the builder undertook. The High Court has recognised that it would be anomalous to find that a builder owed a duty of care to avoid economic loss to a subsequent purchaser if performance of that duty would have required the builder to do more or different work than the contract with the original owner required or permitted.

In light of this, and the fact that a sensible subsequent purchaser will not only check the building, but will ask for an assignment of any rights the first owner has against the builder, builders should try to:

- ensure that any limitations on any warranty given about the building's fitness for purposes are reflected in the contract — in particular, if the first owner has asked that the builder build down to a price, then the terms of the contract should reflect this; and
- include a requirement in the contract that the owner must obtain the builder's consent before assigning the owner's rights under the contract to a subsequent owner. ●

Cybercrime: a clear and present danger

In spite of statistics that confirm cybercrime is growing — and with a global reach that affects large corporate giants, government agencies, small companies and individuals alike — many businesses still do not believe e-security is a top priority. John Musgreave reports.

In a 2002 study of mid-sized companies conducted by IBM Canada and Ipsos-Reid, 60 per cent of respondents indicated that system security was not a top priority and 20 per cent said it was not a priority at all.

At the same time, a 2002 study of Fortune 1000 small and medium sized businesses (including companies operating in Canada) showed that 45 per cent of respondents experienced at least one known or suspected loss due to cybercrime in a 12 month period. The survey, jointly conducted by the American Society for Industrial Security (ASIS) and PricewaterhouseCoopers (PwC), estimated that respondents had proprietary and intellectual property losses in 2001 of between US$53 and US$59 billion.

Perhaps even more startling, observes Jay Ehrenreich of the cybercrime prevention group at PwC, is that most cases of corporate espionage go undiscovered, so the true amount of losses is impossible to estimate.